Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103	))	MB Docket No. ___ RM No. 11203
	)	
Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity	)))	

REPLY TO COMMENTS
TO AMERICAN CABLE ASSOCIATION
PETITION FOR RULEMAKING

The National Association of Broadcasters ("NAB"), the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the "Network Affiliates"), CBS Television ("CBS"), The Walt Disney Company ("Disney"), and NBC Telemundo License Co. ("NBC") opposed the American Cable Association ("ACA") Petition for Rulemaking on April 18, 2005. This reply responds briefly to comments filed in support of the ACA Petition, none of which provides any rational basis for launching the rulemaking proceeding sought by the petition.

The comments filed in support of the ACA Petition suffer from the same flaws as the ACA Petition itself.[1] Most argued in general that small cable systems need to carry local

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[1] Notably, many ACA members filed comments asserting their need to obtain broadcast signals free of charge, although they apparently remain quite willing to pay other programming providers for the value of their content. This array of small-business filers does not, of course, represent the true universe of cable operators that serve in smaller markets because, as we pointed out in our Opposition, more than 50 percent of cable subscribers in hundred-plus markets are served by one of the five largest cable multiple-system operators in the United States. Others who filed seeking relief from the Commission, including BellSouth Corporation, operate at (continued…)

broadcast stations but cannot offer sufficient compensation for carriage.[2] Significantly, however, not one of the commenters provided information that cures the ACA Petition's failure (1) to support assertions regarding the "changed circumstances" that are sufficient to sustain altering the current regulatory system, (2) to present evidence that would support Commission intervention into this set of contractual relationships, or (3) to demonstrate why network programming is "must have" today but was not in 1992-1994.

As our Opposition established, local broadcasters, especially in smaller markets, are undergoing financial hardship. A significant portion of broadcasters' economic troubles derive from two sources: (1) increased competition from a multichannel world, including cable, expanding at dizzying speeds; and (2) increased competition for local advertising revenue from the very cable systems that want to handcuff broadcasters' ability to negotiate for carriage. Yet commenters supporting the ACA Petition ignore both of these issues and the extensive factual record that has been established at the Commission over the years, implying instead that local broadcasters wield market power over cable systems.

In the end, the comments filed to date paint a picture of an industry using the Commission's rulemaking process inappropriately to posture for the upcoming round of must-carry/retransmission consent elections. We urge the Commission to decline this invitation.

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similar scope and economic power as these MSOs. Moreover, more than half of ACA's members are already exempt from two of the rules about which ACA complains (network nonduplication and syndicated exclusivity).

[2] Other commenters, including EchoStar, BellSouth Corporation, OPASTCO and NTCA, argued that the Commission should reconsider its rules not only as applied to small cable systems, but also with respect to Direct Broadcast Satellite (DBS) Service as well as terrestrially-based, non-MSO MVPDs that are still in development.

I. THE CABLE COMMENTERS' ATTEMPT TO PORTRAY THE CABLE INDUSTRY AS EXISTING AT THE MERCY OF BROADCASTERS IS CONTRARY TO THE FACTS AS RECOGNIZED BY CONGRESS AND THE COMMISSION.

The National Cable & Telecommunications Association ("NCTA") supports the ACA Petition, arguing that the environment faced by local broadcasters and operators today is "wholly different" than it was when the Commission considered the exclusivity rules in 1988.[3] NCTA claims that the exclusivity rules were established because of what NCTA calls the "perceived asymmetry" between broadcasters and cable systems that NCTA implies no longer exists.[4] These comments turn the actual economics and real-world market power on its head. If anything there is more asymmetry today between cable and broadcasting.[5] Today, the advantage rests squarely with the franchised cable system.

Cable penetration has risen to roughly 67 percent nationally.[6] Without doubt cable carriage is important to the economic vitality of local broadcast stations. Cable's ability to stifle broadcasters by denying access to subscribers led Congress in 1992 (when cable penetration was, in fact, lower) to set must-carry as a baseline-protection for broadcasters.[7] The

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3 Comments of National Cable & Telecommunications Association in RM-11203 (April 18, 2005) ("*NCTA Comments*"), at 2.

4 *NCTA Comments*, at 3.

5 While the ACA Petition, and many supporting comments from small cable operators, attempt to paint a picture of a bleak economic situation for the smallest cable systems, it bears emphasis that the economic conditions about which they complain are felt in even greater intensity by small-market broadcasters which, unlike their cable competitors, have only one revenue stream.

6 National Cable and Telecommunications Association, Cable Telecom. Industry Overview 2003 Mid-Year 24 (2003) (citing cable penetration rate of U.S. television households as 67.4 percent).

7 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, §§ (2)(15), (16).

Supreme Court upheld carriage obligations on the basis of cable's ability and incentive to cut off broadcasters from their subscribers, thereby jeopardizing the economic vitality of local broadcasters and their ability to provide quality programming of value to the community.[8] Today, cable has a higher penetration rate than it had in 1992 and is more clustered (*i.e.*, concentrated) than ever.[9] Even more persuasive economic and competitive concerns exist today, now that cable advertising sales are dramatically more sophisticated and effective in competing against broadcasters than was the case in 1992. Thus, the statutory and regulatory construct established by Congress and the Commission is just as appropriate today as it was when it was first crafted.

Comments filed jointly by Mediacom Communications and Cebridge Connections in support of the ACA Petition chastise an executive of Disney for "conveniently ignor[ing in testimony before Congress] the fact that broadcasters are armed with must-carry rights, and so can demand carriage by cable systems without the operator's consent and without compensating the operator."[10] But what Mediacom/Cebridge conveniently ignore in this argument is that Congress established the must carry/retransmission consent system in recognition of the value that broadcasting provides to local communities and with full knowledge that different broadcasters would have different abilities to negotiate carriage rights and compensation. Thus, Congress decided, and the Supreme Court agreed, that must-carry protection for broadcasters would preserve the vitality of over-the-air broadcast services by ensuring that broadcasters have

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8 *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

9 *See, e.g., Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶ 141 (rel. Feb. 4, 2005) ("*Eleventh Annual Report*").

10 Comments of Mediacom Communications Corp. & Cebridge Connections in RM-11203 (April 18, 2005) ("*Mediacom/Cebridge Comments*"), at 8.

a way to reach their entire audience. Mediacom/Cebridge is really arguing the that Commission should overturn the statute. The Commission has no authority to do so.

Mediacom/Cebridge further claim of the Disney executive that "[h]e testifies as to the value of ABC network programming to cable operators, but does not say a word about the value of cable distribution to ABC."[11] Broadcasters have never doubted that cable carriage is important. Cable systems have tremendous leverage in retransmission consent negotiations, and broadcasters must elect must-carry where cable systems would not agree to carriage otherwise. How much any particular broadcast station's programming is worth to a cable system (either in terms of cash payment or other compensation) is what the free market negotiations, which are the core of the retransmission consent system, determine. Some stations may not be able to negotiate for any compensation; others will.[12] Contrary to the comments of cable operators, ACA's solution is not pro-competitive and deregulatory.

II. CABLE SYSTEMS HAVE VIABLE ALTERNATIVES TO CARRYING A NETWORK-AFFILIATED BROADCAST STATION.

Local broadcasters provide and produce quality programming, but over-the-air broadcasting is not the only programming option that cable providers can offer their subscribers. There are nearly 400 national non-broadcast programming networks alone. According to NCTA's own numbers, in 2003 all over-the-air networks combined for an all-day viewing share of 38, compared with a 63 share for non-broadcast networks.[13] Clearly this demonstrates that

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[11] *Id.* at 9.

[12] NCTA argues that the Commission's rules regarding network nondupulication used in the context of retransmission consent distort the workings of the marketplace. *NCTA Comments* at 4. Quite the contrary is true. The Commission's rules merely give force and effect to contractual provisions worked out in the free market.

[13] *Eleventh Annual Report*, at ¶ 25.

loss of an individual broadcast station would not leave a cable system bereft of service to offer. If a system is unwilling to provide any form of compensation for carrying a local broadcast station, it has the option of providing alternative programming instead.[14] By contrast, broadcasters cannot practically access the market controlled by cable systems, which virtually without exception have an exclusive franchise for a particular area.[15]

Cable commenters in this proceeding seek to eliminate contracted-for network nondupulication protection if they do not reach agreements with the local network affiliate.[16] Essentially, cable wants to be able to bypass a local broadcaster to negotiate with an out-of-market affiliated-station to obtain the same network programming,[17] even though there are hundreds of alternative programming sources it can provide its subscribers, while broadcasters do not have the ability to bypass a cable system and negotiate with an out-of-market cable system to access the same subscribers. This is the fundamental asymmetry in the market. It is patently unfair to contend that of all of cable's program suppliers, only broadcasters should be required to provide a "competitive" market for its particular network programming. If cable wants, for example, to carry CourtTV or the Hallmark Channel directly from the source, it has no

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14 Smaller cable systems argue that broadcasters are blocking their "ability to find lower-cost alternatives." That is simply not true — there are roughly 400 programming alternatives to any particular network with which cable systems can negotiate if they do not wish to negotiate with a local network-affiliate.

15 Satellite operators may be providing MVPD service to a growing number of homes, but they do not provide local-into-local service in all markets, and certainly not in the smallest markets that are the focus of ACA's petition.

16 It is worth noting that a number of the commenters, including Mediacom/Celbridge and Coosa Cable Company, operate cable systems with under 1,000 subscribers and, therefore, are already exempt from the network nonduplication and syndicated exclusivity rules.

17 The good faith obligation, imposed both on broadcasters and MVPDs, should not limit the freedom of stations to negotiate for the right to distribute specific programming within a specific geographic area any more than it should limit the freedom of cable operators to negotiate the right to distribute programming to cable subscribers within a specific geographic area.

option to go to competing suppliers; why should it have the option of going to competing suppliers of network-affiliated stations in violation of broadcasters' negotiated contracts with their networks?

III. CABLE OPERATORS MAKE PLAIN THAT THEY DO NOT WANT TO PROVIDE ANY COMPENSATION FOR RETRANSMITTING LOCAL BROADCAST STATIONS' CONTENT, EVEN AS THESE SAME CABLE SYSTEMS TARGET BROADCASTERS' ONLY OTHER SOURCE OF REVENUE.

Small cable operators really want to have their cake and eat it too. They argue in one breath that requesting cash for carriage is unreasonable; in the next they assert that negotiating for carriage of additional programming services is unreasonable.[18] They argue, in essence, that broadcasters should give their content to cable systems for free whenever the system wants it. One small cable system balked at broadcaster requests that a cable system carry digital networks on extended basic service tier;[19] one at a request for carriage of other programming services;[20] and all complained that *some* broadcasters *may* seek some or more

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18 This argument stands in stark contrast with the Commission's erroneous conclusion in the Multicast Order that regulation is not needed for broadcasters to obtain carriage of their multicast programming because they can rely on the marketplace. *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, __ FCC Rcd ___, (rel. Feb. 23, 2005) at ¶ 38. Clearly, cable systems are not interested in negotiating for additional carriage. In fact, BellSouth requests the Commission to recommend television stations be *prohibited* from requesting carriage of multicast programming in connection with carriage of the station's analog signal. Comments of BellSouth in RM-11203 (April 18, 2005), at 8.

19 Comments of MetroCast Cablevision in RM-11203 (April 18, 2005).

20 Comments of City of Bardstown, Kentucky's Cable Television Department in RM-11203 (April 18, 2005); Comments of Wyandotte, Michigan, Municipal Service Commission and Wyandotte Municipal Services in RM-11203 (April 18, 2005).

compensation for carriage. Mediacom/Cebridge challenged Disney's practice of seeking any type of compensation.[21]

One is left to wonder why the broadcast industry, of all of cable's program suppliers, is singled out not to receive compensation either in the form of payment per subscriber or carriage of other programming services. Many of the small cable operators give lip-service to the idea of an exchange of value for carriage of local broadcast stations. In fact, what they claim is that no compensation at all is a fair exchange of value.[22]

At the same time cable systems are attacking local broadcasters at the front door by refusing to compensate broadcasters for program content, they are also hitting broadcasters at the back door by aggressively competing for local advertising revenue — the only source of revenue that continues to support free over-the-air broadcasting. Whereas cable systems, therefore, have access to subscriber fees and local ad revenue, and cable networks receive compensation from cable systems per subscriber and advertising revenue, broadcasters are expected to survive on a depleted local advertising base and no guarantee of digital or multicast carriage.

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[21] Mediacom complains that broadcast networks have conditioned retransmission consent on carriage of cable networks that "would not be carried on their own merit," but then Mediacom also complains that networks such as Disney give cable systems the option of monetary compensation instead of carrying additional programming service. *Mediacom/Cebridge Comments* at 4-6. It is unclear what form of compensation for carriage Mediacom/Cebridge would view as acceptable.

[22] The small cable operators generally argue that permitting broadcasters to negotiate for carriage will lead the operators to raise subscriber rates. A 2003 GAO Report, however, found that retransmission consent has no effect on cable rates. U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-0408 (Oct. 2003).

IV. CABLE OPERATORS ERRONEOUSLY IMPLY THAT BROADCASTERS ARE DISCRIMINATING AGAINST SMALLER SYSTEMS

Many of the parties commenting in this proceeding implied that broadcasters are targeting and discriminating against smaller cable systems and new entrants into the MVPD market, including rural telecommunications providers and established local exchange carriers such as BellSouth. But broadcasters have absolutely no incentive to treat smaller cable systems or new entrants unfairly. Rather, broadcasters want to encourage competition in the MVPD marketplace that currently is dominated by a few major cable operators with increasingly clustered systems.

V. CONCLUSION

None of the additional comments submitted in support of the ACA Petition provide any justification to warrant the Commission's launching the rulemaking the petition seeks. We urge the Commission to deny ACA's Petition.

Respectfully submitted,

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